

CROSSBURNING AND THE SOUND OF SILENCE:
ANTISUBORDINATION THEORY AND
THE FIRST AMENDMENT

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IN the early morning hours of June 21, 1990, long after they had put their five children to bed, Russ and Laura Jones were awakened by voices outside their house.¹ Russ got up, went to his bedroom window and peered into the dark.² "I saw a glow," he recalled.³ There, in the middle of his yard, was a burning cross.⁴ The Joneses are black.⁵ In the spring of 1990 they had moved into their four-bedroom, three-bathroom dream house on 290 Earl Street in St. Paul, Minnesota.⁶ They were the only black family on the block. Two weeks after they had settled into their predominantly white neighborhood, the tires on both their cars were slashed.⁷ A few weeks later, one of their cars' windows was shattered, and a group of teenagers had walked past their house and shouted "nigger" at their nine-year-old son.⁸ And now this burning cross. Russ Jones did not have to guess at the meaning of this symbol of racial hatred.⁹ There is not a black person in

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1. Tamar Lewin, *Hate-Crime Law is Focus of Case on Free Speech*, N.Y. TIMES, Dec. 1, 1991, at A1, A32.

2. Peter Meyer, *The Case of Hate*, LIFE, Fall 1991 (Special Issue), at 88.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. The history and meaning behind the symbol of the burning cross is well known. For more than 125 years racist groups have used this symbol in their terroristic campaigns against the black population. See generally DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 424 (1981) (recounting Klan's history as "secret, terrorist society dedicated to maintaining white rule in United States"); JAMES RIDGEWAY, *BLOOD IN THE FACE: THE KU KLUX KLAN, ARYAN NATIONS, NAZI SKINHEADS, AND THE RISE OF A NEW WHITE CULTURE* 7-8 (1990) (describing history of different far right racist organizations in American society and politics); PATSY SIMS, *THE KLAN* 5-8 (1978) (viewing members of Ku Klux Klan and terror they invoke from insider's perspective). Courts have also recognized the historical significance of the burning cross: "[A] black American would be particularly susceptible to the threat of cross burning because of the historical connotations of violence associated with the act. . . . [T]he act has a special capacity to evoke terror among black Ameri-

America who has not been taught the significance of this instrument of persecution and intimidation, who has not had emblazoned on his mind the image of black men's scorched bodies hanging from trees, and who does not know the story of Emmett Till.¹⁰ One can only imagine the terror which Russell Jones must have felt as he watched the flames and thought of the vulnerability of his family and of the hateful, cowardly viciousness of those who would attack him and those he loved under cover of darkness.

This assault on Russ Jones and his family begins the story of *R.A.V. v. City of St. Paul*,¹¹ the "hate speech" case recently decided by the United States Supreme Court. The Joneses, however, are not the subject of the Court's opinion. The constitutional injury addressed in *R.A.V.* was not this black family's right to live where they pleased,¹² or their right to associate with their neighbors.¹³ The Court was not concerned with how this attack might impede the exercise of the Joneses' constitutional right to be full and valued participants in the political community,¹⁴ for it did not view

cans. . . . 'There is a history of violence and intimidation which is directed against blacks and which is symbolized by a burning cross.' " *United States v. Salyer*, 893 F.2d 113, 116 (6th Cir. 1989). A victim of a cross burning stated her belief that "a lot of the cross burnings in the south during the civil rights movement preceded hangings and that sort of thing. Of course, being a black, that is what it calls to mind." *United States v. Lee*, 935 F.2d 952, 956 n.5, (8th Cir.) (quoting trial record at 354), *vacated in part, reh'g en banc granted in part*, 1991 U.S. App. LEXIS 18740 (8th Cir. Aug. 14, 1991).

10. Emmett Till, a 14-year-old boy from Chicago, was killed while visiting relatives in Mississippi in 1955. His alleged "wolf whistle" at a white woman provoked his murderer. CONRAD LYNN, *THERE IS A FOUNTAIN: THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER* 155 (1979); *see also* STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988) (recounting story of black teenager murdered for allegedly whistling at white woman).

11. 112 S. Ct. 2538 (1992).

12. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (stating that proof of racially discriminatory intent in village's refusal to rezone housing area is required to prove violation of Equal Protection Clause); *Barrows v. Jackson*, 346 U.S. 249 (1953) (prohibiting monetary damages for breach of racially restrictive housing covenant); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (prohibiting state enforcement of racially restrictive housing covenant in equity); *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding state housing segregation ordinance unconstitutional).

13. Broad rights of association have been protected by the Supreme Court. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958) (protecting voluntary group membership lists from state inspection); *see also* *NAACP v. Button*, 371 U.S. 415 (1963) (court finding "impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment"); *Roberts v. United States Jaycees*, 468 U.S. 449 (1984) (dicta identifying broad associational rights of individuals in family settings).

14. Existing equality law has long recognized that practices similar to cross-burning constitute violations of their victims' civil rights. Title 42 U.S.C.

R.A.V. as a case about the Joneses' injury. Instead, the Court was concerned primarily with the alleged constitutional injury to those who assaulted the Joneses, that is, the First Amendment rights of the crossburners.¹⁵

§ 1971(b) provides that "no person shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . ." 42 U.S.C. § 1971(b) (1988). This provision has been invoked where sharecropper-tenants in possession of real estate under contract are threatened, intimidated, or coerced by landlords for the purposes of interfering with their rights of franchise. *United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965); *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961). Similarly, 42 U.S.C. § 2000(b) provides for an action for threatened loss of equal access to public facilities. 42 U.S.C. § 2000(b) (1988). Cross burning to exclude persons from access to housing is covered under 42 U.S.C. § 3631(a), which prevents intimidation of "any person because of his race, color, religion, sex" from exercising rights to fair housing. 42 U.S.C. § 3631(a) (1988).

15. Respondent's (Saint Paul, Minnesota) brief before the United States Supreme Court offered the following two questions:

1. May an enactment that has been authoritatively interpreted as proscribing conduct that constitutes fighting words and incites imminent lawless action be sustained, on its face, against claims that it is substantially overbroad and impermissibly vague?
2. Is such an enactment narrowly tailored to serve the compelling interest of protecting victims of bias-motivated harassment against violation of their basic individual rights, which, on balance, far outweigh any minimally protected expression on the part of the accused?

Brief for Respondent at 1, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (No. 90-7675). Similarly, the brief amicus curiae of the Anti-Defamation League supporting respondent stated as a question presented:

May a local government criminalize the act of burning a cross on the private property of a black family under an ordinance limited by the state's highest court to prohibit only fighting words or conduct directed to inciting or producing imminent lawless action and likely to incite or produce such action?

Brief Amicus Curiae of the Anti-Defamation League of B'nai B'rith in support of Respondent at i, *R.A.V.* (No. 90-7675). Not surprisingly, the ACLU argued as amicus that the issue before the Court was that "[t]he ordinance, as written, sweeps within its ambit whole categories of free speech." *R.A.V.* (No. 90-7675). Brief Amicus Curiae of the American Civil Liberties Union, Minnesota Civil Liberties Union, and American Jewish Congress, in Support of Petitioner at 7, *R.A.V.* (No. 90-7675). The ACLU further asserted that the "ordinance targets only communicative activity" rather than protecting basic liberties and rights of citizens. *Id.* at 8. All of these phrasings of the issue before the Court stand in contrast to the Minnesota Supreme Court's view of the salient issue. That court stated "[b]urning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy." *In re R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991), *rev'd*, *R.A.V.*, 112 S. Ct. 2538 (1992).

Interestingly, the principals to the incident did not share the Court's confusion about what was at stake. Their words and actions reflect the human cost and pain that attended this act. The Joneses spoke of the fear caused by the incident and how it resulted in their 11-year-old son's "loss of innocence."

There is much that is deeply troubling about Justice Scalia's majority opinion in *R.A.V.*¹⁶ But it is the utter disregard for the silenced voice of the victims that is most frightening. Nowhere in the opinion is any mention made of the Jones family or of their constitutional rights.¹⁷ Nowhere are we told of the history of the Ku Klux Klan or of its use of the burning cross as a tool for the suppression of speech. Justice Scalia turns the First Amendment on its head, transforming an act intended to silence through terror and intimidation into an invitation to join a public discussion.¹⁸ In so doing, he clothes the crossburner's terroristic act in

Paula Chin et al., *A Crime of Hate*, PEOPLE, Jan. 13, 1992, at 66, 68. The perpetrator's parents apparently recognized this pain in forcing their son to go to the Joneses to apologize. *Id.* at 68. The *People* article also identified the pain that the crossburning incident caused to the perpetrator's family. It contributed to a separation of the perpetrator's parents. *Id.* Furthermore, the seventeen-year-old offender quit his job and moved out of the family home. *Id.* Apparently the perpetrator's parents, at least for a time, lost track of their son's whereabouts. *Id.* For all these people, this is only secondarily a "free speech" issue, if at all.

16. The internal incoherence of Justice Scalia's opinion and its ruthlessly unprincipled revision of settled First Amendment principles are well documented in concurring opinions signed by four of his colleagues. Justices White, Blackmun, O'Connor and Stevens agree that the statute as drafted, was constitutionally infirm. However, they would have invalidated the statute as an overbroad regulation of clearly regulable speech. "This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment." *R.A.V.*, 112 S. Ct. at 2550 (O'Connor, J., concurring). But the concurring Justices could not stand silently by while the majority sought to simultaneously render inoperative much of antidiscrimination law and lay the groundwork for significant incursions on the protection of the First Amendment. Justice Blackmun noted that the Court's majority had decided that "a State cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), . . . this weakens the traditional protections of speech." *Id.* at 2560 (Blackmun, J., concurring). Justice Stevens called Justice Scalia's misguided tour through the First Amendment precedents "an adventure in doctrinal wonderland," an apt description that can only be faulted to the extent that its reference to Lewis Carroll's fantasy distracts from the serious danger the opinion poses to both free speech and equality. *Id.* at 2562.

17. The sole reference to the Joneses in the majority opinion is contained in the second sentence. "They [the petitioner and several other teenagers] then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where the petitioner was staying." *Id.* at 2541.

18. Justice White's concurring opinion captures the way in which the majority transforms an act of coercion and intimidation into high-value political speech. He observes that "the Court's new 'underbreadth' creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms Indeed, by characterizing fighting words as a form of 'debate,' . . . the majority legitimates hate speech as a form of public discussion." *Id.* at 2553-54.

the legitimacy of protected political speech and invites him to burn again.

"Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible"¹⁹ writes Justice Scalia at the close of his opinion. I am skeptical about his concern for the victims. These words seem little more than an obligatory genuflection to decency. For even in this attempt to assure the reader of his good intentions, Justice Scalia's words betray his inability to see the Joneses or hear their voices. "Burning a cross in someone's front yard is *reprehensible*," he says. It is reprehensible but not injurious, or immoral, or violative of the Joneses' rights. For Justice Scalia, the identity of the "someone" is irrelevant. As is the fact that it is a *cross* that is burned.

When I first read Justice Scalia's opinion it felt as if another cross had just been set ablaze. This cross was burning on the pages of U.S. Reports. It was a cross like the cross that Justice Taney had burned in 1857,²⁰ and that which Justice Brown had burned in 1896.²¹ Its message: "You have no rights which a white man is bound to respect (or protect)."²² If you are injured by this assaultive act, the injury is a figment of your imagination that is not constitutionally cognizable."²³

For the past couple of years I have been struggling to find a way to talk to my friends in the civil liberties community about the injuries which are ignored in the *R.A.V.* case. I have tried to artic-

19. *Id.* at 2550.

20. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

21. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

22. Justice Taney, in holding that African Americans were not included and were not intended to be included under the word "citizen" in the Constitution, and could therefore claim none of the rights and privileges which that instrument provides for and secures opined, "[the colored race] had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. at 407.

23. In rejecting plaintiff's argument in *Plessy v. Ferguson* that enforced separation of the races constituted a badge of inferiority Judge Brown stated, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Plessy*, 163 U.S. at 551. Justice Scalia's opinion contains this same dismissive argument. Responding to the City's argument that the ordinance is intended to protect against victimization of persons who are particularly vulnerable because of membership in a group that historically has been discriminated against, Justice Scalia stated that "it is clear that the St. Paul ordinance is not directed to the secondary effects . . . 'The emotive impact of speech on its audience is not a secondary effect.'" *R.A.V.*, 112 S. Ct. at 2549. The argument here, like that in *Plessy*, is that the only injury here is in black folks' heads.

ulate the ways in which hate speech harms its victims and the ways in which it harms us all by undermining core values in our Constitution.²⁴

The first of these values is full and equal citizenship expressed in the Fourteenth Amendment's Equal Protection Clause. When hate speech is employed with the purpose and effect of maintaining established systems of caste and subordination, it violates that core value. Hate speech often prevents its victims from exercising legal rights guaranteed by the Constitution and civil rights statutes.²⁵ The second constitutional value threatened by hate speech is the value of free expression itself. Hate speech frequently silences its victims, who, more often than not, are those who are already heard from least.²⁶ An understanding of both of these injuries is aided by the methodologies of feminism and critical race theory that give special attention to the structures of subordination and the voices of the subordinated.²⁷

My own understanding of the need to inform the First

24. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (June 1990) [hereinafter *If He Hollers*]; see also Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter *The Id, the Ego and Equal Protection*].

25. See *supra* notes 12-14 and accompanying text.

26. Elsewhere I have argued that racist speech disserves the purposes of the First Amendment in at least two other ways. First, such speech has an immediate injurious impact which precludes intermediary reflection on the thought conveyed and the opportunity for responsive speech. Second, to the extent they succeed in their purpose, racial insults intimidate and therefore infect the marketplace of ideas by making it unlikely that a dialogue will follow. Lawrence, *If He Hollers*, *supra* note 24, at 452.

27. CHARLES R. LAWRENCE III ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT (forthcoming June 1993; manuscript at 22, on file with author); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 27 (1979) (explaining why sexual harassment from men silences female victims); Kimberle Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, BOSTON REV., Dec. 1991, at 6, 33 (illustrating how debate over 2 Live Crew plays role in rendering black women voiceless); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982) (indicating that hate speech victims often suffer anti-social behavioral and psychological problems); Robert V. Guthrie, *White Racism and Its Impact on Black and White Behavior*, 1 J. NON-WHITE CONCERNS 144, 146 (1973) (illustrating how overt discrimination forced black parent to accept that Black children used inferior educational facilities); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 159 (1990) (recommending rebuttable presumption that certain categories of discriminatory speech constitute outrageous conduct for purposes of tort of intentional infliction of emotional distress); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 (1989) (detailing adverse effects that hate speech has on its victims).

Amendment discourse with the insights of an antisubordination theory began in the context of the debate over the regulation of hate speech on campus. As I lectured at universities throughout the United States, I learned of serious racist and anti-Semitic hate incidents.²⁸ Students who had been victimized told me of swastikas appearing on Jewish holy days.²⁹ Stories of cross burnings, racist slurs and vicious verbal assaults made me cringe even as I heard them secondhand. Universities, long the home of institutional and euphemistic racism, were witnessing the worst forms of gutter racism. In 1990, the Chronicle of Higher Education reported that approximately 250 colleges and universities had experienced serious racist incidents since 1986,³⁰ and the National Institute Against Prejudice and Violence estimated that 25% of all minority students are victimized at least once during an academic year.³¹

I urged my colleagues to hear these students' voices and argued that *Brown v. Board of Education*³² and its antidiscrimination principle identified an injury of constitutional dimension done to these students that must be recognized and remedied.³³ We do

28. See Constance C.R. White, *The New Racists*, Ms., Oct. 1987, at 68 (describing racist incidents at University of Michigan, University of Massachusetts at Amherst, University of Wisconsin, University of New Mexico, Columbia University, Wellesley College, Duke University and University of California at Los Angeles); KLANWATCH INTELLIGENCE REPORT No. 42, Feb. 1988 (reporting numerous reports of racial and anti-Semitic incidents, including Aryan Resistance literature being distributed at Stanford University and bomb threats made on Jewish Student Union at Memphis State University); Jon Wiener, *Racial Hatred on Campus*, THE NATION, Feb. 27, 1989, at 260, 260 (recounting student publication's ridicule of African-American professor at Dartmouth College and attempted intimidation of academic counselor at Purdue University, where "Death Nigger" was scratched on her office door). This is, of course, only a modest selection of such incidents. It is interesting to note that hate speech is directed at the institutionally empowered (professors) as well as the relatively powerless (students).

29. Sophia M. Fischer, *An Outbreak of Anti-Semitic Incidents*, N.Y. TIMES, Dec. 13, 1992, § 13NJ, at 1; Jessie Mangaliman & Rose Kim, *Vandalism Now Called Bias Crime*, NEWSDAY, Oct. 7, 1992, at 31; *Boy Who Burned Down Synagogue Given Probation Amid Protests*, THE REUTERS LIBRARY REPORT, March 1, 1989.

30. Howard J. Uhrlich, *Campus Ethnoviolence and the Policy Options*, 4 NAT'L INST. AGAINST PREJUDICE & VIOLENCE iii (1990).

31. *Id.* According to Howard J. Uhrlich, Ph.D., of the National Institute Against Prejudice and Violence, minority students have been the target of "verbal harassment, cross-burnings, hate literature, beatings, brawls, anti-homosexual graffiti, swastikas and racially-motivated slurs." Deb Riechmann, *Colleges Tackle Increase in Racism on Campuses*, L.A. TIMES, Apr. 30, 1989 (Bulldog Ed.), Part I, at 36.

32. 347 U.S. 483, 495 (1954) (holding that separate educational facilities are inherently unequal and deprive plaintiffs of equal protection under law).

33. Lawrence, *If He Hollers*, *supra* note 24, at 438-41, 462-66.

not normally think of *Brown* as being a case about speech. Most narrowly read, it is a case about the rights of black children to equal educational opportunity. But *Brown* teaches us another very important lesson: that the harm of segregation is achieved by the meaning of the message it conveys.³⁴ The Court's opinion in *Brown* stated that racial segregation is unconstitutional not because the "physical separation of black and white children is bad or because resources were distributed unequally among black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children."³⁵ Segregation stamps a badge of inferiority upon blacks.³⁶ This badge communicates a message to others that signals their exclusion from the community of citizens.³⁷

The "Whites Only" signs on the lunch counter, swimming pool and drinking fountain convey the same message. The antidiscrimination principle articulated in *Brown* presumptively entitles every individual to be treated by the organized society as a

34. *Id.* at 439. In an earlier discussion of this same subject, I stated: The prevention of stigma was at the core of the Supreme Court's unanimous decision in [*Brown*] . . . that segregated public schools are inherently unequal. Observing that the segregation of black pupils "generates a feeling of inferiority as to their status in the community," . . . Chief Justice Warren recognized what a majority of the Court had ignored almost sixty years earlier in [*Plessy*] . . . : The social meaning of racial segregation in the United States is the designation of a superior and an inferior caste, and segregation proceeds "on the ground that colored citizens are . . . inferior and degraded." . . . Note that while formal, legally sanctioned segregation was the chief form of stigmatization prior to *Brown* and the Civil Rights Act of 1964, . . . the system has yet to be dismantled, and other stigmatizing mechanisms—including the exclusion of blacks from private clubs, privately enforced housing discrimination, and deprecating portrayals of blacks in the media—have reinforced its effects. *Id.* at 439 n.37 (citations omitted).

35. *Id.* at 439.

36. *Brown*, 347 U.S. at 494.

37. *Id.*; see also *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (stating that social meaning of racial segregation in United States is designation of superior and inferior caste, and segregation proceeds "on the ground that colored citizens are . . . inferior."); For a discussion of the "cultural meaning" of segregation, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960); Charles R. Lawrence III, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 18 (1977) (recognizing that institution of racial segregation injures blacks by labeling them inferior and that, once established, institution is self-perpetuating); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977) (discussing system of racial segregation in United States).

respected, responsible and participating member. This is the principle upon which all our civil rights laws rest. It is the guiding principle of the Equal Protection Clause's requirement of nondiscriminatory government action.³⁸ In addition, it has been applied in regulating private discrimination.³⁹

The words "Women Need Not Apply" in a job announcement,⁴⁰ the racially exclusionary clause in a restrictive covenant⁴¹ and the racial epithet scrawled on the locker of the new black employee at a previously all-white job site⁴² all convey a political message. But we treat these messages as "discriminatory practices" and outlaw them under federal and state civil rights legislation because they are more than speech.⁴³ In the context of social inequality, these verbal and symbolic acts form integral links in historically ingrained systems of social discrimination. They work to keep traditionally victimized groups in socially isolated, stigmatized and disadvantaged positions through the promotion of fear, intolerance, degradation and violence. The Equal Protection Clause of the Fourteenth Amendment requires the disestablishment of these practices and systems.⁴⁴ Likewise, the First Amendment does *not* prohibit our accomplishment of this compelling constitutional interest simply because those discriminatory prac-

38. U.S. CONST. amend. XIV, § 1; *see also* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that law is not unconstitutional solely because of racially disproportionate impact); *Brown*, 347 U.S. at 495 (holding that "separate but equal" doctrine has no place in field of public education").

39. *See supra* note 32 and accompanying text.

40. *See, e.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (supporting regulation of gender-specific "Help Wanted" advertising).

41. *See, e.g.*, *Burrows v. Jackson*, 346 U.S. 249, 251-52 (1953) (holding that enforcement of covenant forbidding use of real estate by non-Caucasians, by state action, violates Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 4-5 (1948) (private agreements restricting ownership of property based on race violates Equal Protection Clause of Fourteenth Amendment).

42. *See, e.g.*, *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991) (holding employer liable for acts of racial harassment by employees).

43. *See, e.g.*, Civil Rights Act of 1964 §§ 201-207, 42 U.S.C. §§ 2000a-2000a-6 (1988) (public accommodations); *id.* §§ 601-606, 42 U.S.C. §§ 2000d-2000d-7 (1988) (federally assisted programs); 42 U.S.C. §§ 2000e-2000e-17 (equal employment opportunities). None of these regulations have been struck down as an unconstitutional infringement of an individual's speech or association rights.

44. For a discussion of the requirements of the Equal Protection Clause in this regard, *see* KENNETH L. KARST, *BELONGING TO AMERICA* 4 (1989) (stressing importance of Equal Protection Clause); Kenneth L. Karst, *Citizenship, Race and Marginality*, 30 WM. & MARY L. REV. 1, 1 (1988) (stating that Fourteenth Amendment forbids organized society from treating people as members of inferior caste).

tices are achieved through the use of words and symbols.⁴⁵

The primary intent of the cross burner in *R.A.V.* was not to enter into a dialogue with the Joneses, or even with the larger community, as it arguably was in *Brandenburg v. Ohio*.⁴⁶ His purpose was to intimidate—to cast fear in the hearts of his victims, to drive them out of the community, to enforce the practice of residential segregation, and to encourage others to join him in the enforcement of that practice.⁴⁷ The discriminatory impact of this

45. Private parties have been successfully prosecuted for activities that are arguably within the confines of the First Amendment. See generally Delgado, *supra* note 27, at 133-34, 150-65 (arguing that an independent tort action for racial insults is permissible and necessary); Matsuda, *supra* note 27, at 2320, 2327-30. See also Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (cook sued employer for calling him "nigger" and menacing him repeatedly for emotional distress damages under 42 U.S.C. § 1981); Wiggs v. Courshon, 355 F. Supp. 206 (S.D. Fla. 1973) (black family called "bunch of niggers" and father called "black son-of-a-bitch" by waitress sued for intentional infliction of emotional distress and received reduced verdict of \$2,500); Gomez v. Hug, 645 P.2d 916 (Kan. Ct. App. 1982) (Mexican-American sued individual for intentional infliction of emotional distress for calling him "fucking spic," "Mexican greaser" and "pile of shit"); Dominguez v. Stone, 638 P.2d 423 (N.M. Ct. App. 1981) (Mexican national residing in U.S. sued individual for intentional infliction of emotional distress when that person publicly questioned her employment and suggested she should be a janitor due to her ethnic origin).

46. 395 U.S. 444 (1969). The Court found Ohio's Criminal Syndicalism Act unconstitutional on the ground that it failed to distinguish between the advocacy of ideas to the larger community, even the advocacy of the necessity and propriety of resorting to violence, and the advocacy that is directed to inciting or producing imminent lawless action and is likely to produce such action. *Id.* at 448-49. In doing so, the Court overturned the conviction of a Klansman who stated in an address to a public gathering of Klansmen that, if the government continued to suppress white people, "it's possible that there might have to be some revengeance [sic] taken." *Id.* at 446.

47. Justice Stevens in his concurrence observed that "the cross-burning in this case—directed as it was to a single African-American family trapped in their home—was nothing more than a crude form of physical intimidation." *R.A.V.*, 112 S. Ct. at 2569 (Stevens, J., concurring).

[T]he "content" of the "expressive conduct" represented by a "burning cross" . . . is not less than the first step in an act of racial violence. It was an unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of a match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim[']s head.

Id.; cf. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that speech likely to encourage racial segregation may not be banned and that ordinance, which prohibited posting of real estate "For Sale" and "Sold" signs to promote racial integration by discouraging white flight, was unconstitutional). The signs could not be banned because they were messages to the larger community and thus protected under the rubric of *Brandenburg*. However, in *R.A.V.*, the burning of the cross was not a message advocated to the larger community but was a direct message of intimidation and threat. Courts have consistently refused to protect expressive activity that constitutes a threat

speech is of even more importance than the speaker's intent.⁴⁸ In protecting victims of discrimination, it is the presence of this discriminatory impact, which is a compelling governmental interest unrelated to the suppression of the speaker's political message, that requires a balancing of interests rather than a presumption against constitutionality.⁴⁹ This is especially true when the interests that compete with speech are also interests of constitutional dimension.⁵⁰

One such interest is in enforcing the antidiscrimination principle. Those opposed to the regulation of hate speech often view the interest involved as the maintenance of civility, the protection of sensibilities from offense, or the prohibition of group defamation. But this analysis misconstrues the nature of the injury. "Defamation—injury to group reputation—is not the same as discrimination—injury to group status and treatment." The former "is more ideational and less material" than the latter, "which recognizes the harm of second-class citizenship and inferior social standing with the attendant deprivation of access to resources, voice, and power."⁵¹

to another, even where an actual intent to do harm is lacking. See, e.g., *Ladner v. United States*, 358 U.S. 169 (1958).

48. Even the majority in *R.A.V.* admits that speech can be regulated when the government's purpose is to prohibit proscribable conduct when it argues that "a valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the speech.'" *R.A.V.*, 112 S. Ct. at 2546 (citations omitted). [S]ince words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of the statute directed at conduct rather than speech." *Id.* If we are to take the majority at its word the St. Paul ordinance could be saved simply by redrafting it within the context of a larger statute regulating conduct (including speech) intended to deprive certain individuals of their civil rights.

49. In a previous discussion of this issue, I noted:

When the Klan burns a cross on the lawn of a black person who . . . [has] exercised his right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market. It is a threat, a threat made in the context of a history of lynching, beatings, and economic reprisals that made good on earlier threats, a threat that silences a potential speaker.

Lawrence, *If He Hollers*, *supra* note 24, at 471-72.

50. *Id.* at 480-81.

51. Brief for the National Black Women's Health Project as Amicus Curiae Supporting Respondent at 15, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (No. 90-7675). The brief continued:

Certainly, being treated as a second-class citizen furthers the second-class reputation of the group of which one is a member, even as a demeaned reputation permits and encourages social denigration and

The Title VII paradigm of "hostile environment" discrimination best describes the injury to which victims of racist, sexist and homophobic hate speech are subjected. When plaintiffs in employment discrimination suits have been subjected to racist or sexist verbal harassment in the workplace, courts have recognized that such assaultive speech denies the targeted individual equal access to employment. These verbal assaults most often occur in settings where the relatively recent and token integration of the workplace makes the victim particularly vulnerable and where the privately voiced message of denigration and exclusion echoes the whites-only and males-only practices that were all-too-recently official policy.⁵²

Robinson v. Jacksonville Shipyards, Inc.,⁵³ a Title VII case that appears to be headed for review in the Supreme Court, presents a clear example of the tension between the law's commitment to free speech and its commitment to equality. Lois Robinson, a welder, was one of a very small number of female skilled craftworkers employed by Jacksonville Shipyards. She brought suit under Title VII of the Civil Rights Act of 1964, alleging that her employer had created and encouraged a sexually hostile, intimidating work environment.⁵⁴ A U.S. District Court ruled in her favor, finding that the presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks made by male employees and supervisors which demeaned women, constituted a violation of Title VII "through the maintenance of a sexually hostile work environment."⁵⁵ Much of District Court Judge Howell Melton's opinion is a recounting of the indignities that Ms. Robinson and five other women experienced almost daily while working with 850 men over the course of ten years.⁵⁶ In addition to the omnipresent display of sexually explicit drawings, graffiti, calendars,

exclusion. But equality is an interest of Constitutional dimension; repute, however weighty, is not. The failure to recognize the equality interest at stake in 'group libel' statutes . . . has trivialized the harm and obscured the state interest, disabling the constitutional defense of such laws against First Amendment attack.

Id.

52. For example, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the plaintiff, Lois Robinson, was one of just six women working with over 850 men.

53. *Id.*

54. *Id.* at 1490.

55. *Id.* at 1491.

56. *Id.* at 1494-1501.

centerfold-style pictures, magazines and cartoons, the trial record contains a number of incidents in which sexually suggestive pictures and comments were directed at Robinson.⁵⁷ Male employees admitted that the shipyard was "a boys' club" and "more or less a man's world."⁵⁸

The local chapter of the American Civil Liberties Union (ACLU) appealed the District Court's decision, arguing that "even sexists have a right to free speech."⁵⁹ However, anyone who has read the trial record cannot help but wonder about these civil libertarians' lack of concern for Lois Johnson's right to do her work without being subjected to assault.⁶⁰

The trial record makes clear that Lois Robinson's male colleagues had little concern for advancing the cause of erotic speech when they made her the target of pornographic comments and graffiti. They wanted to put the usurper of their previously all-male domain in her place, to remind her of her sexual vulnerability and to send her back home where she belonged. This speech, like the burning cross in *R.A.V.*, does more than communicate an idea. It interferes with the victim's right to work at a job where she is free from degradation because of her gender.⁶¹

But it is not sufficient to describe the injury occasioned by

57. Brief for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc. and American Civil Liberties Union, Inc. at 3, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (No. 91-3655) [hereinafter ACLU's Amicus Curiae Brief].

58. *Robinson*, 760 F. Supp. at 1493.

59. Mike Graham, *Sexism in Shipyards Sets off Legal Battle*, THE TIMES (London), Nov. 24, 1991 (Overseas News section).

60. The National ACLU, to its credit, has considered the civil liberties of the women working at this shipyard as well as those of the male employees who have claimed that the district court order violates their First Amendment rights. The national office parted company with the local branch, filing an amicus curiae brief in the appeal to the Eleventh Circuit which argues that "in certain very narrow circumstances expressive activity may be restricted. One example is speech that itself effectuates unlawful activity — including employment discrimination." ACLU's Amicus Curiae Brief at 12, *Robinson* (No. 91-3655). The brief goes on to argue that the district court did not apply the appropriate standard in determining liability but notes that "the record does contain testimony that could be relied upon . . . in conducting the proper inquiry." *Id.* at 18. Finally the brief argues that the district court's remedial order is not sufficiently narrowly tailored. *Id.* at 19-23.

61. Justice Scalia distinguished the Title VII hostile environment cases from *R.A.V.* arguing that in those cases "sexually derogatory words 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 112 S. Ct. at 2541.

hate speech only in terms of the countervailing value of equality. There is also an injury to the First Amendment. When Russ Jones looked out his window and saw that burning cross, he heard a message that said, "*Shut up, black man, or risk harm to you and your family.*" It may be that Russ Jones is especially brave, or especially foolhardy, and that he may speak even more loudly in the face of this threat. But it is more likely that he will be silenced, and that *we* will lose the benefit of his voice.

Professor Laurence H. Tribe has identified two values protected by the First Amendment.⁶² The first is the intrinsic value of speech, which is the value of individual self expression.⁶³ Speech is intrinsically valuable as a manifestation of our humanity and our individuality. The second is the instrumental value of speech. The First Amendment protects dissent to maximize public discourse, and to achieve the great flowering of debate and ideas that we need to make our democracy work.⁶⁴ Both of these values are implicated in the silencing of Russ Jones by his nocturnal attacker.

For African-Americans, the intrinsic value of speech as self-expression and self-definition has been particularly important. The absence of a "black voice" was central to the ideology of European-American racism, an ideology that denied Africans their humanity and thereby justified their enslavement.⁶⁵ African-American slaves were prevented from learning to read and write, and they were prohibited from engaging in forms of self-expression that might instill in them a sense of self-worth and pride. Their silence and submission was then interpreted as evidence of their subhuman status. The use of the burning cross as a method of disempowerment originates, in part, in the perpetrators' understanding of how, in the context of this ideology, their victims are rendered subhuman when they are silenced.⁶⁶ When, in the face of threat and intimidation, the oppressors' victims are afraid to give full expression to their individuality, the oppressors

62. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-89 (2d ed. 1988).

63. *Id.*

64. *Id.*

65. See Henry Louis Gates, Jr., *Frederick Douglass and the Language of Self*, in *FIGURES IN BLACK: WORDS, SIGNS, AND THE "RACIAL" SELF* 98, 104 (1987) (noting that absence of collective black voice effectively allowed European philosophers to deprive African slaves of their humanity).

66. See Kendall Thomas, *A House Divided Against Itself: A Comment on "Mastery, Slavery, and Emancipation,"* 10 *CARDOZO L. REV.* 1481, 1510-12 (1989) (explaining that black slave's humanity was destroyed when silenced).

achieve their purpose of denying the victims the liberty guaranteed to them by the Constitution.

When the Joneses moved to Earl Street in St. Paul, they were expressing their individuality. When they chose their house and their neighbors, they were saying, "This is who we are. We are a proud black family and we want to live here." This self-expression and self-definition is the intrinsic value of speech. The instrumental value of speech is likewise threatened by this terrorist attack on the Joneses. Russ and Laura Jones also brought new voices to the political discourse in this St. Paul community. Ideally, they will vote and talk politics with their neighbors. They will bring new experiences and new perspectives to their neighborhood. A burning cross not only silences people like the Joneses, it impoverishes the democratic process and renders our collective conversation less informed.⁶⁷

First Amendment doctrine and theory have no words for the injuries of silence imposed by private actors. There is no language for the damage that is done to the First Amendment when the hateful speech of the crossburner or the sexual harasser silences its victims. In antidiscrimination law, we recognize the necessity of regulating private behavior that threatens the values of equal citizenship.⁶⁸ Fair housing laws,⁶⁹ public accommodations provisions⁷⁰ and employment discrimination laws⁷¹ all regulate the behavior of private actors. We recognize that much of the discrimination in our society occurs without the active participation of the state. We know that we could not hope to realize the constitutional ideal of equal citizenship if we pretended that the government was the only discriminator.⁷²

67. For a more detailed discussion of the ways in which racist speech infects and disrupts the marketplace of ideas, see Lawrence, *If He Hollers*, *supra* note 24, at 467-72.

68. 42 U.S.C. §§ 1981-2000h-6 (1988).

69. 42 U.S.C. §§ 3601-3631 (1988).

70. 42 U.S.C. §§ 2000a-2000a-6 (1988).

71. 42 U.S.C. §§ 2000e-2000e-17 (1988).

72. Roughly stated:

[The state action] doctrine holds that although someone may have suffered harmful treatment of a kind that one might ordinarily describe as a deprivation of liberty or denial of equal protection of the laws, that occurrence excites no constitutional concern unless the proximate active perpetrators of the harm include persons exercising the special authority or power of the government of a state.

Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989). This doctrine embodies the notion in American life and law that racial discrimination can be accurately divided into two spheres, "public" and "private." While this the-

But there is no recognition in First Amendment law of the systematic private suppression of speech. Courts and scholars have worried about the heckler's veto,⁷³ and, where there is limited access to speech fora, we have given attention to questions of equal time and the right to reply.⁷⁴ But for the most part, we act as if the government is the only regulator of speech, the only censor.⁷⁵ We treat the marketplace of ideas as if all voices are equal, as if there are no silencing voices or voices that are silenced.⁷⁶ In the discourse of the First Amendment, there is no way to talk about how those who are silenced are always less powerful than those who do the silencing. First Amendment law ignores the ways in which patriarchy silences women, and racism silences people of color. When a woman's husband threatens to beat her

ory seems to have value in the abstract, it fails to account for the way discrimination operates in the real world. Lawrence, *If He Hollers*, *supra* note 24, at 444-49; see also DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 207-77 (2d ed. 1980) (examining discrimination in administration of justice, including civil and criminal remedies available).

73. See generally Eric Nesser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L. J. 257 (1985); Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259 (1979); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Eve H. Lewin Wagner, Note, *Heckling: A Protected Right or Disorderly Conduct?* 60 S. CAL. L. REV., 215 (1986).

74. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385-86 (1969) (upholding FCC's "fairness doctrine," requiring that both sides of public issues be given fair coverage).

75. Cf. Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81, 104 (Issue 2, Spring 1991). Professor Grey has spoken directly to this issue, noting that

[u]nder the civil-rights perspective, defense of basic human rights is by no means simply a matter of limiting state power. Government may deny equal protection by omission as well as by action—for example, by refusing law enforcement protection to minorities. . . . [T]he civil-rights approach, with its roots in anti-discrimination law and social policy, is centrally concerned with injuries of stigma and humiliation to those who are the victims of discrimination The point is not so much to protect a sphere of autonomy or personal security from *intrusion* as to protect potentially marginal members of the community from *exclusion*—from relegation, that is, to the status of second-class citizens.

Id. at 82.

By contrast, for civil-libertarians

[t]he active state is traditionally conceived as the sole or dominant threat to civil liberties. Civil libertarians do not spend much of their time or energy seeking ways to positively empower dissenters, deviants, and nonconformists against the pressures brought on them by unorganized public opinion, or by private employers or landlords.

Id.

76. CATMARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 206 (1989) (theorizing that words are given more protection under Constitution than acts).

the next time she contradicts him, a First Amendment injury has occurred.⁷⁷ "Gay-bashing" keeps gays and lesbians "in the closet."⁷⁸ It silences them. They are denied the humanizing experience of self-expression. We *all* are denied the insight and beauty of their voices.

Professor Mari Matsuda has spoken compellingly of this problem in a telling personal story about the publication of her own thoughtful and controversial *Michigan Law Review* article on hate speech, "Public Response to Racist Speech: Considering the Victim's Story."⁷⁹ When she began working on the article, a mentor at Harvard Law School warned her not to use this topic for her tenure piece. "It's a lightning rod,"⁸⁰ he told her. She followed his advice, publishing the article years later, only after receiving her university tenure and when visiting offers from prestigious schools were in hand.⁸¹

"What is the sound of a paper unpublished?" writes Professor Matsuda. "What don't we hear when some young scholar chooses tenure over controversial speech? Every fall, students return from summer jobs and tell me of the times they didn't speak out against racist or anti-Semitic comments, in protest over unfairness or ethical dilemmas. They tell of the times they were invited to discriminatory clubs and went along in silence. What is the sound of all those silenced because they need a job? These silences, these things that go unsaid, aren't seen as First Amendment issues. The absences are characterized as private and voluntary, beyond collective cure."⁸²

In the rush to protect the "speech" of crossburners, would-be champions of the First Amendment must not forget the voices of their victims. If First Amendment doctrine and theory is to truly serve First Amendment ideals, it must recognize the injury

77. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 93 (1991). "The most conservative figures estimate that women are physically abused in 12% of all marriages, and some scholars estimate that as many as 50% or more of all women will be battering victims at some point in their lives." *Id.* at 10-11; see also *id.* at 18-19 (exploring women's response of silence and denial to husbands' abuse in order to protect themselves from societal disapproval).

78. See Lawrence, *If He Hollers*, *supra* note 24, at 455 nn.96-97 (relating description of speech inhibiting impact hearer experienced when called "faggot" by man on subway).

79. Matsuda, *supra* note 27, at 2320.

80. Mari Matsuda, "Who Owns Speech," Address at Hofstra School of Law, (Nov. 13 (1991)).

81. *Id.*

82. *Id.*

done by the private suppression of speech; it must take into account the historical reality that some members of our community are less powerful than others and that those persons continue to be systematically silenced by those who are more powerful. If we are truly committed to free speech, First Amendment doctrine and theory must be guided by the principle of antissubordination. There can be no free speech where there are still masters and slaves.